

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAR -9 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2009-0324-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
DAVID MICHAEL COOK)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-042978

Honorable John S. Leonardo, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

David Michael Cook

Florence
In Propria Persona

H O W A R D, Chief Judge.

¶1 Petitioner David Cook was convicted after a jury trial of first-degree murder, kidnapping and attempted sexual assault. *State v. Cook*, No. 2 CA-CR 94-0608

(memorandum decision filed Nov. 9, 1995). This court affirmed his convictions and sentences on appeal. *Id.* at 7. In this petition for review, Cook challenges the trial court's ruling on what appears to have been his third request for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. The trial court summarily dismissed Cook's notice, finding the issue raised therein was precluded because it could have been raised on appeal or in a prior Rule 32 proceeding. *See* Ariz. R. Crim. P. 32.2(b) (trial court shall summarily dismiss notice of post-conviction relief raising precluded claims). We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no such abuse here.

¶2 In his petition for review, Cook asserts, as he did in his notice below, that his sentences are illegal and unconstitutional. But Rule 32.9(c)(1)(iv), Ariz. R. Crim. P., requires that a petition for review contain the "reasons why the petition should be granted." And Cook has failed to sustain his burden of establishing the trial court erred in finding his claims are precluded. *See* Ariz. R. Crim. P. 32.2(b).

¶3 Additionally, Cook's claim is clearly precluded. Rule 32.2(a)(3) provides: "A defendant shall be precluded from relief under this rule based upon any ground" that was "waived at trial, on appeal, or in any previous collateral proceeding." Because Cook has filed an appeal and at least two previous petitions for post-conviction relief, he has waived his claim. Moreover, even if the alleged error can be characterized as fundamental, as Cook contends, claims of fundamental error can be precluded. *See State v. Swoopes*, 216 Ariz. 390, ¶ 42, 166 P.3d 945, 958 (App. 2007).

¶4 The trial court correctly found Cook's claim precluded and properly dismissed Cook's notice of post-conviction relief. *See* Ariz. R. Crim. P. 32.2(b). Accordingly, because the trial court did not abuse its discretion by dismissing Cook's notice for post-conviction relief, we grant review of Cook's petition but deny relief.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Presiding Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge